Supreme Court, U.S.
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No. 95-82

In the Supreme Court of the United States

OCTOBER TERM, 1995

BENJAMIN G. SPRECHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

KATHLEEN A. FELTON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTIONS PRESENTED

1. Whether the courts below correctly resolved petitioner's allegations of ineffective assistance of counsel, first raised in a post-conviction motion under 28 U.S.C. 2255.

2. Whether the district court correctly determined that petitioner's counsel did not prevent him from exercising his right to testify at trial.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Billy-Eko v. *United States*:	
113 S. Ct. 2989 (1993)	8
8 F.3d 111 (2d Cir. 1993)	3, 7, 8
Brady v. *Maryland*, 373 U.S. 83 (1963)	3
Chappell v. *United States*, 494 U.S. 1075 (1990)	8
Diaz-Albertini v. *United States*, 498 U.S. 1061 (1991)	8
Guinan v. *United States*, 6 F.3d 468 (7th Cir. 1993)	8
Michel v. *Louisiana*, 350 U.S. 91 (1955)	4
Nichols v. *Butler*, 953 F.2d 1550 (11th Cir. 1992)	11
Strickland v. *Washington*, 466 U.S. 668 (1984)	4, 10
United States v. *Aguirre*, 912 F.2d 555 (2d Cir. 1990)	11
United States v. *Casamayor*, 837 F.2d 1509 (11th Cir. 1988), cert. denied, 488 U.S. 1017 (1989)	8
United States v. *Cronic*, 466 U.S. 648 (1984)	7
United States v. *Daniel*, 956 F.2d 540 (6th Cir. 1992)	8
United States v. *DeRewal*, 10 F.3d 100 (3d Cir. 1993), cert. denied, 114 S. Ct. 1544 (1994)	7-8
United States v. *Frady*, 456 U.S. 152 (1982)	6, 7
United States v. *Galloway*, 56 F.3d 1239 (10th Cir. 1995)	7, 8
United States v. *Hon*, 17 F.3d 21 (2d Cir. 1994)	4
United States v. *Javino*, 960 F.2d 1137 (2d Cir.), cert. denied, 113 S. Ct. 477 (1992)	4
United States v. *Kellum*, 42 F.3d 1087 (7th Cir. 1994)	8
United States v. *Mal*, 942 F.2d 682 (9th Cir. 1991)	8

Cases—Continued: Page

United States v. *Mala*, 7 F.3d 1058 (1st Cir. 1993), cert. denied, 114 S. Ct. 1839 (1994) 7
United States v. *Navejar*, 963 F.2d 732 (5th Cir. 1992).. 8
United States v. *Smith*, No. 94-5724 (4th Cir. Aug. 21, 1995) 8
United States v. *Sprecher*:
783 F. Supp. 133 (S.D.N.Y. 1992) 2
988 F.2d 318 (2d Cir. 1993) 2
United States v. *Thompson*, 972 F.2d 201 (8th Cir. 1992) 8
Wainwright v. *Sykes*, 433 U.S. 72 (1977) 7

Statutes and regulations:

Jencks Act, 18 U.S.C. 3500 3
18 U.S.C. 371 2
18 U.S.C. 1001 2
18 U.S.C. 1503 2
18 U.S.C. 1505 2
18 U.S.C. 1621 2
28 U.S.C. 2255 ..... 2, 7, 8

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OPINIONS BELOW

The opinion of the court of appeals affirming the district court's denial of petitioner's motion under 28 U.S.C. 2255 (Pet. App. A1-A5) is unreported, but the decision is noted at 50 F.3d 3 (Table). The opinion of the district court (Pet. App. A8-A20) is unpublished. The opinion of the court of appeals affirming petitioner's conviction is reported at 988 F.2d 318; the district court's opinion and verdict following petitioner's bench trial is reported at 783 F. Supp. 133.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 1995. A petition for rehearing was

denied on March 16, 1995. On June 5, 1995, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including July 14, 1995, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiring to commit securities fraud and related false statement and obstruction of justice offenses, in violation of 18 U.S.C. 371, 1001, 1503, 1505, and 1621. He was sentenced to concurrent terms of 46 months' imprisonment and two years' supervised release on each count; he was also fined $50,000. *United States* v. *Sprecher*, 783 F. Supp. 133 (S.D.N.Y. 1992). The court of appeals affirmed the convictions but remanded for resentencing. *United States* v. *Sprecher*, 988 F.2d 318 (2d Cir. 1993). On remand, the district court resentenced petitioner to 37 months' imprisonment.

Petitioner then brought several motions for post-conviction relief pursuant to 28 U.S.C. 2255. Following an evidentiary hearing, the district court denied the motions (Pet. App. A8-A20), and the court of appeals affirmed (Pet. App. A1-A5).

1. In his post-conviction motions, petitioner argued that his trial counsel, Ivan S. Fisher, provided ineffective assistance of counsel and that the government engaged in misconduct. He claimed that his counsel provided ineffective assistance for several reasons: (1) that Fisher failed to disclose a conflict of interest stemming from his pending state disciplinary proceedings, which arose from his 1989

guilty plea to misdemeanor tax charges; (2) that Fisher provided a less than vigorous defense out of fear of government retaliation; (3) that Fisher coerced petitioner into waiving his right to testify; and (4) that counsel's performance was deficient because he failed to call various potential witnesses, object to certain evidence, or make certain arguments or other trial decisions. Pet. App. A10-A14; Gov't C.A. Br. 11. Petitioner's claim of government misconduct was based on his allegation that the government failed to turn over materials required by *Brady* v. *Maryland*, 373 U.S. 83 (1963), and the Jencks Act, 18 U.S.C. 3500, and that the government knowingly allowed certain witnesses to commit perjury. Pet. App. A15; Gov't C.A. Br. 11-12.

In response to petitioner's allegations of ineffective assistance of counsel, the government submitted affidavits of Fisher, his associate, and petitioner's co-defendant G. Alexander Novak. The government submitted a declaration and affidavits from two prosecutors and an FBI agent in response to the allegations of government misconduct. The district court also held an evidentiary hearing. Pet. App. A11; Gov't C.A. Br. 12-15.

In a written opinion, the district court denied all of petitioner's claims. The court first noted that not all of petitioner's allegations of ineffective assistance of counsel were properly raised in a Section 2255 petition. Under *Billy-Eko* v. *United States*, 8 F.3d 111 (2d Cir. 1993), because petitioner had been represented by new counsel on direct appeal, his claims that did not require further development of the record were procedurally barred if they had not been raised on direct appeal. Pet. App. A10. Thus, the district court rejected as procedurally barred a number of

petitioner's allegations relating to his counsel's trial performance, *i.e.*, the failure to make certain objections or ask particular questions. The court also found, however, that those allegations related to matters of trial strategy and therefore would not support a claim of ineffective assistance in any event. Pet. App. A10; see *Strickland* v. *Washington*, 466 U.S. 668, 688 (1984); *Michel* v. *Louisiana*, 350 U.S. 91, 101 (1955); *United States* v. *Hon*, 17 F.3d 21, 26-27 (2d Cir. 1994); *United States* v. *Javino*, 960 F.2d 1137, 1145 (2d Cir.), cert. denied, 113 S. Ct. 477 (1992).

With regard to petitioner's claim that Fisher's disciplinary proceedings created a conflict of interest that deprived petitioner of the effective assistance of counsel, Fisher testified at the evidentiary hearing that he had discussed his legal problems with petitioner several times; petitioner's co-defendant (Novak) also testified that he was aware of Fisher's situation and that he had discussed it with petitioner. In contrast, petitioner testified that he was only vaguely aware of Fisher's legal problems and did not know their full nature and scope. The district court concluded that Fisher and Novak were "extremely credible witnesses." The court found that petitioner was aware of his trial counsel's legal difficulties and that "his testimony that he would not have retained Fisher if he had had more information is unworthy of belief." Pet. App. A11.

The district court also rejected petitioner's allegations that Fisher was prevented from pursuing a vigorous defense by his fear of government retaliation. The court found that "[t]hroughout the trial Fisher was an intelligent and diligent advocate for his client" who "repeatedly challenged the government." Pet. App. A11. The district court carefully

considered the relevant facts concerning petitioner's claims that Fisher prevented him from testifying at trial and failed to call certain important witnesses, and rejected both contentions. The court found that petitioner was well aware of his right to testify, discussed that option thoroughly with his attorney, and eventually agreed with Fisher's advice not to take the stand. *Id.* at A12-A13. And the court concluded that none of the witnesses petitioner claimed should have been called "could have provided significant evidence on any of the central issues." *Id.* at A14.

Finally, although the district court noted that petitioner's claims of government misconduct were procedurally barred, it nevertheless considered the claims and found them meritless. Pet. App. A14-A19.[1]

2. Petitioner renewed all of his claims on appeal. The court of appeals affirmed, discussing only the claim of Fisher's alleged conflict of interest. Because the district court was unaware of the alleged conflict at the time of trial, the court of appeals noted, it was unable to follow any procedures to ensure that petitioner made a knowing and intelligent waiver of his counsel's possible conflict. The district court relied on its finding that Fisher had explained the alleged conflicts to his client; but the court of appeals had previously found it insufficient to rely on the very attorney whose capacity to act in his client's interest is in question to explain the ramifications of potential conflicts to the defendant. Pet. App. A3.

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[1] Petitioner also argued that his sentence should be reduced, but the district court rejected those arguments as well, noting that they had already been carefully considered both at the original sentencing and at the resentencing. Pet. App. A19.

In the absence of an on-the-record waiver, the court of appeals considered whether Fisher's alleged conflicts denied petitioner the effective assistance of counsel. Finding no actual conflict of interest stemming either from Fisher's earlier criminal prosecution or from his state disciplinary proceedings, the court of appeals concluded that at most Fisher labored under a potential conflict of interest and that petitioner suffered no prejudice in light of the district court's finding that Fisher conducted an intelligent and diligent defense. Pet. App. A4.

As for petitioner's other arguments, the court of appeals stated only that it had carefully considered them and found them meritless. Pet. App. A4.

ARGUMENT

1. Petitioner contends (Pet. 6-16) that this Court should grant review to resolve a conflict among the courts of appeals on the question whether certain claims of ineffective assistance of counsel must be raised on direct appeal or be considered procedurally defaulted. To the extent that some courts differ slightly in their procedural rules for bringing claims of ineffective assistance of counsel, however, this case does not directly implicate that variation, since the courts below actually addressed all aspects of petitioner's ineffectiveness claim and rejected each of them on the merits.

This Court has "long and consistently affirmed that a collateral challenge may not do service for an appeal." *United States* v. *Frady*, 456 U.S. 152, 165 (1982) (citing cases). In order to ensure that final judgments command respect, and that their binding effect does not last only until "the next in a series of endless postconviction collateral attacks," *ibid.*, the

Court has established a more stringent standard of waiver on collateral attack than the "plain error" standard that is used on direct appeal. When a defendant has failed to raise a claim both in the trial court and on his direct appeal, he must clear a "significantly higher hurdle than would exist on direct appeal." *Id.* at 166. To obtain relief on collateral attack, the defendant must show both "cause" for failing to raise the issue before his conviction became final, and "actual prejudice" resulting from the alleged error. *Id.* at 168; *Wainwright* v. *Sykes*, 433 U.S. 72, 84, 87 (1977).

On the other hand, claims of ineffective assistance of counsel ordinarily must be raised in the first instance in a motion under 28 U.S.C. 2255. See *United States* v. *Cronic*, 466 U.S. 648, 667 n.42 (1984); *United States* v. *Galloway*, 56 F.3d 1239, 1240 (10th Cir. 1995) (en banc); *Billy-Eko* v. *United States*, 8 F.3d 111, 114 (2d Cir. 1993). That is because the record on appeal typically does not permit the reviewing court to make an informed decision with respect to a claim of ineffectiveness that is raised for the first time at that stage. In addition, if the same lawyer represents the defendant at trial and on appeal, it is unrealistic to expect that lawyer to argue on appeal that his own trial performance was ineffective. Accordingly, the courts of appeals have expressed a strong preference (or in some cases required) that an ineffective assistance claim be presented to the district court in the first instance in a motion under Section 2255.[2]

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[2] See, *e.g.*, *United States* v. *Mala*, 7 F.3d 1058, 1063 (1st Cir. 1993), cert. denied, 114 S. Ct. 1839 (1994); *United States* v. *Billy-Eko*, 8 F.3d 111, 114 (2d Cir. 1993); *United States* v. *DeRewal*, 10 F.3d 100, 103-104 (3d Cir. 1993), cert. denied, 114

The Second Circuit has expressed a limitation on this general rule. It requires defendants to raise a claim of ineffective assistance of trial counsel on direct appeal when the defendant is represented by new counsel on appeal and the claim is based solely on the trial record. *Billy-Eko* v. *United States*, 8 F.3d at 115. See also *Guinan* v. *United States*, 6 F.3d 468, 472 (7th Cir. 1993).

The United States, however, has advocated one uniform rule for all claims of ineffective assistance of trial counsel, so that the rule is clear and easy to apply. See *Billy-Eko*, 8 F.3d at 115; *Guinan*, 6 F.3d at 475 (Easterbrook, J. concurring) (discussing *Billy-Eko* v. *United States*, 113 S. Ct. 2989 (1993); *Diaz-Albertini* v. *United States*, 498 U.S. 1061 (1991); *Chappell* v. *United States*, 494 U.S. 1075 (1990), all of which were granted, vacated, and remanded for further consideration in light of the position asserted by the Solicitor General).

Petitioner claims that the Second Circuit's rule requiring certain claims of ineffective assistance of counsel to be raised on direct appeal on pain of default conflicts with the general rule followed by other courts, which allows all such claims to be raised in the first instance in a motion under 28 U.S.C. 2255. He urges this Court to grant review and establish a

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S. Ct. 1544 (1994); *United States* v. *Smith*, No. 94-5724 (4th Cir. Aug. 21, 1995), slip op. 16; *United States* v. *Navejar*, 963 F.2d 732, 735 (5th Cir. 1992); *United States* v. *Daniel*, 956 F.2d 540, 543 (6th Cir. 1992); *United States* v. *Kellum*, 42 F.3d 1087, 1094-1095 (7th Cir. 1994); *United States* v. *Thompson*, 972 F.2d 201, 203-204 (8th Cir. 1992); *United States* v. *Mal*, 942 F.2d 682, 689 (9th Cir. 1991); *United States* v. *Galloway*, 56 F.3d 1239 (10th Cir. 1995) (en banc); *United States* v. *Casamayor*, 837 F.2d 1509, 1516 (11th Cir. 1988), cert. denied, 488 U.S. 1017 (1989).

uniform procedure for ineffectiveness claims. But whatever tension exists between the rule generally followed by all the courts and the narrow limitation on that rule established by the Second Circuit is not presented in the instant case. Here the district court actually considered each aspect of petitioner's ineffectiveness claim, so the different rule followed by the Second Circuit in certain circumstances actually made no difference in petitioner's case.

The district court conducted an evidentiary hearing on petitioner's principal claim, a conflict of interest involving his trial counsel, and also considered in conjunction with that claim the overall performance of his trial counsel. Far from finding petitioner's ineffectiveness claim procedurally barred, the district court conducted an exhaustive inquiry into the primary basis for petitioner's allegation of ineffective assistance of counsel, and it considered on the merits all the allegations made by petitioner, even those that should have been procedurally barred by the law of the circuit. See Pet. App. A10, A14. The district court stated that certain aspects of petitioner's ineffectiveness claim were barred by the rule of *Billy-Eko*, but the court considered those allegations anyway and found them all essentially matters of trial strategy that would not support a claim of ineffectiveness.[3]

Petitioner also claims (Pet. 10-11) that the decision below has added confusion to the rule laid down in *Billy-Eko*; he refers to the statement of the district court that some of petitioner's allegations were

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[3] The district judge was the same one who had presided at petitioner's bench trial, so she was obviously well suited to assess the quality of his counsel's representation.

barred because they were not based on "matters outside the trial record." Pet. App. A10. That statement suggests, petitioner asserts, that any claim relating to matters that occurred at trial must be raised on direct appeal, without regard to whether the trial record provides a full development of the facts necessary to analyze the allegation of attorney ineffectiveness. Read in context, however, the district court's statement, following a citation to *Billy-Eko*, was clearly meant as a restatement of the limitation expressed in *Billy-Eko*, *i.e.*, that when a defendant has new counsel on direct appeal and a claim that needs no further record development, he must raise his ineffective assistance of counsel claim at that time. In this case, the district court explained, a number of petitioner's claims related simply to matters of trial strategy and could clearly be considered without taking any further evidence; indeed, they were so plainly within the range of normal trial tactics that they would not support any claim of ineffective assistance of counsel. As the district court said elsewhere in its opinion, petitioner's basic complaint with respect to a number of his allegations of attorney ineffectiveness was essentially "an argument that his attorney should have presented his defense in a different way," obviously not the kind of allegation that would amount to a constitutional deficiency in his representation. Pet. App. A14; *Strickland* v. *Washington*, 466 U.S. at 688.

It is plain from the opinion of the district court that, despite its observation that some of petitioner's claims were procedurally barred, the court carefully and thoroughly examined the entirety of Fisher's representation of petitioner and concluded that there was no constitutional inadequacy. Thus, whatever

limitation the Second Circuit places on the general rule for presenting claims of ineffective assistance of counsel has had no effect on the outcome of this case. Petitioner received complete consideration of his claims on the merits, despite his failure to raise those issues on direct appeal.

2. Petitioner also contends (Pet. 20-23) that the courts below erred in holding that he was not denied his right to testify. He claims that the decision in this case conflicts with the decision of the Eleventh Circuit in *Nichols* v. *Butler*, 953 F.2d 1550 (1992) (en banc). That argument is without merit.

In *Nichols* v. *Butler*, the court held that it was ineffective assistance of counsel for an attorney to threaten to withdraw during trial if his client insisted on testifying, because the defendant was thus forced to choose between his right to counsel and his right to testify. 953 F.2d at 1552-1554. The district court in this case heard testimony on petitioner's claim that Fisher kept him from testifying and credited Fisher's testimony that he did not remember ever threatening to withdraw. Fisher said that he and his client had a number of "heated discussions" about the wisdom of petitioner's testifying, but that each conversation concluded with petitioner deferring to his attorney's opinion. Pet. App. A12.

The district court therefore concluded that the case before it was distinguishable from *Nichols* and more closely resembled another case, *United States* v. *Aguirre*, 912 F.2d 555, 562-563 (2d Cir. 1990). The court of appeals in *Aguirre* held that, where the defendant discussed his right to testify with his counsel and ultimately agreed to follow his lawyer's advice not to take the stand, there was no ineffective assistance of counsel.

Petitioner incorrectly asserts (Pet. 21) that the district court accepted his claim that Fisher may have threatened to withdraw if petitioner insisted on testifying. In fact, the district court credited Fisher's recollection that he did not threaten to withdraw. Fisher said that "while it is possible he might have said such a thing in the heat of the moment," he did not remember making such a threat. Rather, Fisher recalled that each of his discussions with petitioner on the subject of his testifying concluded with petitioner telling him that Fisher, as his attorney, should make the decision. Pet. App. A12. In light of that finding, the decision below does not conflict with the holding of *Nichols*. Petitioner's disagreement with the district court's factual finding that no coercion occurred is not an issue that merits this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

KATHLEEN A. FELTON
Attorney

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